IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 22ND JANUARY 2007 / 2ND MAGHA 1928

CRL.A.No. 1455 of 2006(C)

SC.358/2003 of III ADDL.SESSIONS COURT, KOLLAM
CP.167/2000 of JUDL.MAGISTRATE OF FIRST CLASS-II, KOLLAM

.....

APPELLANT:

RAJENDRAN,
C.NO.9398, CENTRAL PRISON, TRIVANDRUM.

BY ADV. ADV.BINDU SREEKUMAR(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

* *

Crl. Appeal No. 1455 of 2006

* *

Dated, this the 22nd day of January 2007

JUDGMENT

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who was the sole accused in S.C. 350/03 on the file of the III Addl. Sessions Court, Kollam challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 55 (a) of the Abkari Act.

2. The case of the prosecution is that on 4-6-2000 at about 7.35 p.m. on the public road leading to Kollam thodu in H & C compound in Udayamarthandapuram cheri the accused was found in possession of 4 litres of illicit arrack and two glass tumblers and the sale proceeds of arrack and since the illicit arrack was evidently meant for sale, the accused has committed offences punishable under Sec. 8 (2) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 4 witnesses as P.W.s 1 to 4 and got marked 7 documents as Exts. P1 to P7 and 2 material objects

as Mos 1 and 2.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He had the following to submit before court:-

At about 7 p.m. on 4-6-2000 two police men came and took him into custody. They asked him as to whether he was the person who had deflated the tyre of the police jeep which was parked near the H & C ground at Pallithottam. They told him that he will be released if he showed him the real culprit who had deflated the tyre of the police jeep. That is how he was falsely implicated in this case.

5. Since the learned Addl. Sessions Judge, did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 6-5-2006 found the appellant guilty of the offence punishable under Sec. 55(a) of the Abkari Act and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs. 1,00,000/- and on default to pay the fine, to suffer rigorous imprisonment for six months.

It is the said judgment which is assailed in this appeal.

6. I heard Advocate Smt. A. Bindu Sreekumar, the learned counsel who defended the appellant on State Brief and Advocate Sri. K. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

8. P.W. 1 is an independent witness who has figured as an attester to Ext.P3 mahazar prepared by the detecting officer. He not only did not admit his signature in Ext.P3 but also turned hostile to the prosecution.

9. P.W.2 is the Sub Inspector of Kollam East Police Station who detected the offence.

10. P.W.3 is the police constable who had accompanied P.W.2.

11. P.W. 4 was the Additional Sub Inspector who conducted the investigation and laid the charge before court.

12. After an anxious consideration of the oral and documentary evidence in the case and after hearing both sides, I am of the view that the prosecution has not succeeded in establishing the guilt of the accused beyond reasonable doubt.

13. Going by the testimony of P.Ws 2 and 3 it was at 7.35 p.m. on 4-6-2000 that they had allegedly stumbled upon the accused carrying a jerry can and two glass tumblers. P.W.2 was then proceeding in his jeep on patrol duty and P.W.3, a police constable attached to that police station was in his company at that time. Even though the testimony of P.Ws 2 and 3 as well as the recitals in Ext.P3 contemporaneous mahazar prepared by P.W.2 allegedly from the spot itself would go to show that P.W.2 had drawn a sample of 180 ml. from the bulk quantity of contraband liquor carried by the accused and that the sample bottle was seized along with the bulk quantity contained in the jerry can under Ext.P3 mahazar after packing sealing and labeling the sample bottle, the bottle which was produced before court on 23-6-2000, that is after a delay of 19 days did not contain any seal as is evidenced by Ext.P5 property list. P.W.4 who was the additional Sub Inspector who had produced the material before court as part of the investigation has no explanation either for the belated production or for the absence of seal on Item No. 1 in Ext.P5 which is the sample bottle. The only other material which the prosecution relies on to prove that the liquid carried by the accused in the jerry can was illicit arrack containing 29.94 percent volume of Ethyl Alcohol was Ext.P7 certificate of chemical analysis. Ext. P7 refers to a letter dated 19-7-2000 received from the committal Magistrate along with a sealed bottle containing 180 ml of a

liquid. It is not explained as to why the Magistrate had sent a sealed sample for analysis even without any requisition or forwarding note by the investigating officer. Secondly, there is nothing to show that the sample which was analysed under Ext.P7 report of analysis was the very same sample which was drawn by P.w.2 on 4-6-2000 from the bulk quantity of the liquor carried by the accused. As mentioned earlier, P.W.2 would claim to have sealed the sample bottle from the spot itself. But the bottle which was produced as item No. 1 on 23-6-2000 as revealed by Ext.P3 property list was not a sealed bottle. There is absolutely no material before court to show as to who despatched the sample to the chemical examiner and on which date and whether it was as per the orders of the Magistrate. Apart from the lack of any contemporaneous record maintained by the committal Magistrate the thondi section clerk who might have despatched the sample, (he being the custodian of all properties received in the Magistrate's court) was neither cited nor examined as a witness. There is , therefore, no link evidence to show that the sample which was allegedly taken by the detecting officer was the sample which was eventually forwarded to the chemical examiner for analysis. It is well settled that when samples of this type change several hands, it is the bounden duty of the prosecution to prove that the sample drawn in the given case reached the hands of the chemical examiner in a tamper proof condition. (Vide

The State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala v. State of Kerala - 1993 (2) KLT 550). The prosecution in this case to fail for want of the aforesaid link evidence without which a conviction against the accused cannot safely be recorded. The conviction entered by the learned Addl. Sessions Judge overlooking the above vital aspect cannot therefore, be sustained and is accordingly, dislodged.

The appellant is found not guilty of the offence punishable under Sec. 55 (a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case.

In the result, this Criminal Appeal is allowed as above.

V. RAMKUMAR,
(JUDGE)

ani.

V. RAMKUMAR, J.

* *

Crl. Appeal No. 1455 of 2006

* *

Dated, this the 22nd day of January 2007

GIST OF JUDGMENT